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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-5184

KEVIN JOSEPH LYNCH,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Authorities and Argument	7
Conclusion	14
Appendix A	A1
Appendix B.	A3
Appendix C	A19

Table of Cases.

Aguilar v. State of Texas, 378 U. S. 108 (1964) 8

Johnson v. The United States 8

Spinelli v. United States, 393 U. S. 410 (1969) 5, 10

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KEVIN JOSEPH LYNCH,

Petitioner,

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STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Iowa, entered on the 8th day of May, 1972, in the case entitled "State of Iowa, Appellee, vs. Kevin Joseph Lynch, Appellant."

CITATIONS TO OPINIONS BELOW

The judgment of the District Court of the State of Iowa in and for Linn County in the case of "State of Iowa vs. Kevin Joseph Lynch" is unreported and is printed in Appendix B hereto, *infra*, p. 1. The opinion of the Supreme Court of the State of Iowa, printed in Appendix B hereto, *infra*, pp. 2-12, is reported in 197 N. W. 2d 186.

JURISDICTION

The opinion of the Supreme Court of the State of Iowa was entered on April 13, 1972. A petition for rehearing was filed with said Court, and was denied by order dated May 8, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

QUESTION PRESENTED

Can an information for a search warrant which is based in part on certain information which has been related to the affiant by unidentified informants provide the magistrate with sufficient probable cause for the issuance of the search warrant when the information for a search warrant contains no facts which in any way inform the magistrate of certain underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusions or to attempt to support the affiant's claim that the informants were credible or their information reliable.

STATUTES INVOLVED

The State statutes and laws involved are the following, both of which are printed in Appendix A hereto:

1. Article I, Section 8, Constitution of the State of Iowa.
2. Sections 751.4, 751.5, 1966 Code of Iowa.

STATEMENT OF CASE

Petitioner herein was arrested on December 22, 1968, and charged with the crime of possession of narcotic drugs, contrary to the statutes of the State of Iowa (R. p. 11).

Prior to the arrest of the Defendant as aforesaid, and more particularly, on the 20th day of December, 1968, police officers from the Cedar Rapids, Iowa Police Department swore to an information for a search warrant in the Linn County, Iowa District Court, which information requested a search warrant to search the Defendant and a man's blue suitcase (R. pp. 9-10). A copy of the information for search warrant referred to herein is printed in Appendix C hereto, *infra*. The information for a search warrant was presented to the Honorable William R. Eads at approximately 12:10 P. M. on December 20, 1968, and a search warrant issued signed by said judge on that date (R. p. 11). A copy of the search warrant is printed in Appendix C hereto, *infra*, pp. 3 and 4. On the 22nd day of December, 1968, pursuant to the aforesaid warrant, a search was conducted of a man's blue suitcase by officers of the Cedar Rapids Police Department, and a return of service of said search warrant was made and filed with the Court (R. pp. 12-13). Among some of the items found during the aforesaid search were certain narcotic drugs, and a brown pasty substance later identified during the trial of this cause by a chemist as 234.8 grams of good grade marijuana (R. p. 12).

On the 18th day of July, 1969, the Defendant filed a Motion to Suppress Evidence, which Motion alleged that the information for the search warrant referred to herein did not furnish sufficient probable cause for the issuance of the search warrant, and that the subsequent search of the suitcase violated the Defendant's rights pursuant to the Fourth Amendment to the Constitution of the United States and Article I, Section 8, of the Constitution of the State of Iowa, and in particular, the information for the search warrant did not set forth sufficient circumstances and facts necessary to enable the magistrate independently to judge on the validity of the informant's conclusions, and

that said information set forth no facts or circumstances to support the officer's claim that their informants were, in fact, credible, or that their information was reliable (R. pp. 4-8). The State of Iowa resisted Defendant's Motion to Suppress, and on the 26th day of August, 1969, the Court overruled Defendant's Motion to Suppress Evidence (R. pp. 15-16). The cause came on for trial pursuant to assignment on October 20, 1969, before a jury. During the trial, the blue suitcase which was the subject of the search referred to aforesaid was marked as State's Exhibit 4 and was admitted into evidence over the objection of Defendant (R. pp. 71-72). A paper bag containing eight tinfoil wrapped balls of a pasty brown substance was marked as State's Exhibit 5, and was identified as being 234.8 grams of good grade marijuana having been removed from the man's blue suitcase marked State's Exhibit 4, and was admitted into evidence over Defendant's objection (R. pp. 84-85). On the 22nd day of October, 1969, the jury rendered a verdict finding the Defendant guilty of the crime of possession of marijuana (R. p. 114).

On the 28th day of August, 1970, the Court pronounced judgment and sentence against the Defendant, and the Defendant was adjudged to be guilty of the crime of possession of marijuana and was sentenced to pay a fine of Five Hundred Dollars ($500.00) and to serve a term of two years at the Iowa Mens Reformatory at Anamosa, Iowa, and to pay the costs (R. p. 117).

The judgment against the Petitioner as aforesaid was appealed to the Iowa Supreme Court. In affirming the judgment, the Iowa Supreme Court rejected Petitioner's claim that the search warrant under which the contraband drugs were seized, was issued without probable cause. The Iowa Supreme Court found from the facts that on December 20, 1968, a search warrant issued upon the order of the

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Honorable Willam R. Eads, Judge of the Linn County District Court, and that said judge found probable cause had been shown for the immediate search of a man's suitcase for "narcotic drugs, marijuana, and prescription drugs." They further found that the order for issuance of search warrant was based entirely upon the facts shown in the sworn information filed by Detectives Trousdale and Mayer, who had stated under oath substantially as follows: That they had made a complete investigation into Defendant's activities and knew all of the facts in the police file, that they were aware of Defendant's suspicious activities during the previous two weeks; that they had reliable information from a reliable informant who is a credible resident of the State of Iowa that Defendant has been selling narcotic drugs and marijuana, and that Defendant left several days previous to the date of application for California to pick up a load of drugs; that during a flight into Cedar Rapids Defendant had offered to obtain drugs for an air line stewardess; that Defendant was arrested on or about June 5, 1968, in California on a narcotics charge; that an official from United Air Lines informed affiants that Defendant had offered to obtain narcotics for the stewardess on his flight on December 19, 1968. In their opinion, the Iowa Supreme Court summarized the circumstances under which probable cause may be said to exist for the issuance of a search warrant, both under Amendment Four of the United States Constitution, and under Section 8, Article I of the Constitution of the State of Iowa, as: (1) Search warrants may issue only on a showing of probable cause under oath or affirmation; (2) In passing on the validity of a search warrant, a reviewing court may consider only information brought to the attention of the issuing officer; (3) The issuing officer must make his own independent determination of probable cause on the basis of facts related to him, and may not rely on mere conclu-

sions recited by the applicant. The Iowa Supreme Court found that, except for the recitation that Defendant had offered to supply narcotics to the stewardess on the flight into Cedar Rapids, there was no probable cause shown for the issuance of the search warrant. They further stated that all of the other conclusions made by the affiants were entirely unsupported by the facts. The Iowa Supreme Court held that they would affirm the issuance of the search warrant only because of the factual recitation concerning the conduct of the Defendant on his flight to Cedar Rapids, and that it was reasonable to conclude that one traveling on an airliner who offers narcotics to the stewardess may have such narcotics on his person or among his effects, and, supported by the statements of an official of the air lines, this was sufficient to furnish probable cause.

The Iowa Supreme Court apparently ignored the fact that the information for the search warrant in this case was based on certain facts and conclusions given the affiants from two sources. This information came from (1) an unidentified informant, and (2) an unidentified "official" of United Air Lines. Finally, the Iowa Supreme Court ignored their prior holding which they summarized in this case setting forth the circumstances under which probable cause may be said to exist for the issuance of a search warrant, and in particular, ignored the holding of *Spinelli* v. *United States*, 393 U. S. 410, which states the two standards that must be met in situations such as this before probable cause may be shown to exist, namely: (1) That the application must set forth certain underlying circumstances necessary to enable the magistrate independently to judge on the validity of the informant's conclusion, and (2) That the application must purport in some way to support the affiant's claim that the informant was credible or his information reliable.

REASONS FOR GRANTING THE WRIT

1. The holding of the Iowa Supreme Court sanctions a procedure whereby search warrants may issue without first providing the issuing magistrate with sufficient probable cause for the issuance of the search warrant.

2. The holding of the Iowa Supreme Court allows search warrants to issue which are based on information obtained from unidentified informants without the necessity of furnishing the issuing magistrate information as to certain underlying circumstances necessary to enable the magistrate independently to judge on the validity of the informant's conclusion, or to furnish facts which support the claim that the informant was credible or his information reliable.

3. The holding of the Iowa Supreme Court allows evidence, which is garnered or seized pursuant to a search warrant which was issued contrary to acceptable federally guaranteed constitutional standards, to be used as evidence in state court trials in the State of Iowa in direct conflict to holdings of the Supreme Court of the United States.

AUTHORITIES AND ARGUMENT

The Fourth Amendment to the Constitution of the United States states that the right of a person to be secure in his person, house, papers and effects, against unreasonable searches and seizures shall not be violated, and further states that no warrant shall issue to search any of the aforesaid items, but on probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. In connection herewith the main issue is whether or not the information for a search warrant in the instant action provided the magistrate sufficient probable cause for the issuance of the

warrant in question. It is the contention of the petitioner that the information referred to herein did not furnish sufficient probable cause for the issuance of the search warrant, and was, therefore, defective, and that the search warrant issued on the basis of the information was not proper and was illegal, and that any evidence seized thereby should be suppressed and is, therefore, inadmissible.

The decision of the Supreme Court of the United States in *Aguilar* v. *State of Texas*, 378 U. S. 108 (1964), clarified many questions with what is or is not sufficient probable cause for the issuance of a search warrant. *Aguilar* involved a search by two Houston police officers pursuant to a search warrant to search for narcotics at Aguilar's home. In support of the officers' application for the issuance of the warrant, they submitted an affidavit which in part, recited that: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana and barbituates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use, contrary to the provisions of law." Based upon the aforesaid statement, the Justice of the Peace issued a warrant that certain narcotic items were discovered at the home of the petitioner. Upon appeal to the Supreme Court of the United States, it was held by the court that any evaluation as to the sufficiency or constitutionality of a search warrant should begin with a rule that "the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried actions of officers who may happen to make arrests." The whole purpose for the requirement of the Fourth Amendment is quoted in *Aguilar* from a quote of Justice Jackson which originally appeared in the case of *Johnson* v. *The United States*, and which states: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the

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support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer being engaged in the often competitive enterprise of ferreting out crime." Thus, under the Fourth Amendment, a magistrate may not properly issue a warrant to search a private dwelling unless he can find probable cause therefrom from the facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough. The Supreme Court went on in *Aguilar* to state that the vice in the affidavit therein was that the "mere conclusion" that *Aguilar* possessed narcotics was not even that of the affiant himself. It was that of an unidentified informant. The affidavit there not only contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, but that it did not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. The only thing that appeared in *Aguilar* according to the court was that the affiant who signed the information for the search warrant merely suspected, believed or concluded that there were narcotics in petitioner's possession. These facts certainly could not enable the magistrate to judge for himself the pursuasiveness of the facts relied on in order to show probable cause.

It should be pointed out at this point that the petitioner herein is not alleging that informations for search warrants will be insufficient if based in part or in whole upon hearsay information, and that informations for search warrants need direct personal observations of the affiant. This is not the law and the petitioner herein acquiesces in the opposite. However, petitioner subscribes to and quotes the Supreme Court in *Aguilar* where they state: "The magistrate must be informed of some of the underlying circum-

stances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or his information reliable." To do otherwise, would result in the inference from the facts which led to the complaint being drawn, not by a neutral and detached magistrate as the constitution requires, but instead by a police officer "engaged in the often competitive enterprise of ferreting out crime."

The case of *Spinelli* v. *United States*, 393 U. S. 410 (1969), amplified upon *Aguilar* and clearly set forth the requirements necessary for an information for a search warrant to be sufficient, and to provide adequate probable cause. In *Spinelli* the affidavit was that of an F. B. I. agent, was very lengthy, and related both to actual personal observations made by the F. B. I. agent, and information supporting these observations and conclusions from an unidentified informant. The Supreme Court of the United States held the affidavit for the issuance of the search warrant to be insufficient, and as a result, struck down the search which was conducted as a result thereof. The court in *Spinelli* cited with approval the two standards previously set forth in *Aguilar* which were (1) that the application must set forth certain underlying circumstances necessary to enable the magistrate independently to judge on the validity of the informant's conclusion, and (2) that the application must attempt in some way to support the affiant's claim that the informant was credible or his information reliable.

The Supreme Court in Spinelli went on to state that an information for a search warrant which relies in part upon an unidentified informant's report must first be measured against *Aguilar's* standards so that its probative value may

be assessed. If the tip is found inadequate under *Aguilar*, then the other allegations which corroborate or tend to corroborate the information in the hearsay report should then be considered. However, at any stage in the determination by the magistrate, the standards enunciated in *Aguilar* must inform the magistrate as follows: "Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration." *Aguilar* is very relevant at that stage of the inquiry because tests it establishes are designed to implement the long-standing principle that probable cause must be determined by a "neutral and detached magistrate, and not by an officer engaged in the competitive business of ferreting out crime." In applying the above principles to the *Spinelli* case, the Supreme Court first considered the weight to be given the informer's tip when it was considered apart from the rest of the affidavit. They found it was clear that a commissioner could not credit it without abdicating his constitutional function. Although the affiant swore that his information was "reliable", he offered the magistrate no reason in support of his conclusion. Thus, the magistrate had no independent facts upon which to base his decision as to the reliability or non-reliability of the informant's tip, and therefore, the information failed to pass the test as set forth under the *Aguilar* decision. In *Spinelli*, the informant's sources for information were not set forth, and no facts were alleged to indicate why or how the informant was in any way reliable. In connection therewith, the Supreme Court held: "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor circulat-

ing in the underworld or an accusation based on an individual's general reputation."

In the case of this petitioner, we have a situation very similar to that which existed in *Spinelli*. We have the statements made apparently to the affiants by the unidentified informant, and by the unidentified "official" of United Air Lines, relative to the petitioner and his activities, but with no recitation as to how either of these informants came by their facts. We further have no information as to why either of the informants was reliable or credible, and thus, the independent determination as to merit or nonmerit of the informant's information was taken from the hands of the magistrate and placed in the hands of the detectives who were engaged in "the competitive business of ferreting out crime." The tips of the informants were allegedly corroborated and supported in the instant action by certain observations made by the affiants on the information" that they knew all the facts in the police file about the Defendant, and that they had observed the Defendant's suspicious actions." As the Iowa Supreme Court correctly found, these conclusions were entirely unsupported by the facts. The Iowa Supreme Court found that the only showing which established probable cause in the entire information for the search warrant, was the factual recitation concerning the conduct of the petitioner on his flight to Cedar Rapids. The court held that it is reasonable to conclude that one traveling on an airliner who offers narcotics to the stewardess may have such narcotics on his person or among his effects. Supported by the statements of an official of the air lines, this was sufficient in the eyes of the Iowa Supreme Court to furnish probable cause. However, at no place on the information for the search warrant in this matter is there any reference to the fact that any of the information contained therein

came directly from the stewardess herself. Perhaps the Iowa Supreme Court assumed this to be the case, and if so, acted contrary to the holdings in *Aguilar* and *Spinelli*. Also, even though one of the informants was identified as being an "official" of the air lines, no facts were presented to the magistrate as to what sort of an "official" of the air line was the informant, nor were any facts concerning the background of the "official" of the air line given to the magistrate on the information for search warrant which the Iowa Supreme Court found to be the only information presented to the magistrate. It is clear that the requirement that the magistrate, prior to issuing a search warrant, be informed of some of the underlying circumstances from which the affiant concluded that the informants, whose identity need not be disclosed, were credible or their information reliable, was not complied with. By labeling one of the unidentified as an "official" of the air lines does not adequately or properly meet this requirement. There are most certainly unreliable "officials" of the air lines as well as reliable "officials", that particular industry being no different than any other industry or business. Without furnishing further information as to the particular "official" and his reputation for reliability, or any information as to the source from which the "official" garnered his facts, the requirements of *Aguilar* and *Spinelli*, which are the law of this country, have not been complied with.

It therefore appears that the final resolution and settlement of the problems raised in this Petition for Writ of Certiorari are plainly in the interests of the administration of criminal justice.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

R. FRED DUMBAUGH,
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Cedar Rapids, Iowa 52401,
Attorney for Petitioner.

APPENDIX A

1. *Article I, Section 8, Constitution of the State of Iowa*

Personal security—searches and seizures. Sec. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

2. *Section 751.4, 1971 Code of Iowa*

751.4 Information. Any credible resident of this state may make appplication for the issuance of a search warrant by filing before any magistrate, except a judge of the supreme court, a written information, supported by his oath or affirmation, and alleging therein the existence of any ground or grounds specified in this chapter as ground for issuance of a search warrant and that he believes and has substantial reason to believe that said ground or grounds exist in fact. Said information shall describe with reasonable certainty the person or premises, or both, to be searched, the property to be seized, and the person, if known, in possession of said premises and property.

If the magistrate thereafter issues the search warrant, he shall endorse on the application the name and address of all persons upon whose sworn testimony he relied to issue such warrant together with an abstract of such witness' testimony. However, if the grounds for issuance is supplied by an informant, the magistrate shall only identify the peace officer to whom the information was

given and that he finds that such informant had previously given reliable information.

3. *Section 751.5, 1971 Code of Iowa*

751.5 Issuance of warrant. If the magistrate is satisfied from his examination of the applicant, and of other witnesses, if any, and of the allegations of the information, of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring said property before him.

APPENDIX B

IN THE DISTRICT COURT OF IOWA,
in and for Linn County

THE STATE OF IOWA, *Plaintiff,* *vs.* KEVIN JOSEPH LYNCH, *Defendant.*	No. 22799 Judgment and Sentence

The defendant appears in open court in person and with his counsel R. Fred Dumbaugh, for sentencing. The defendant is sentenced under the provisions of Chapter 204 and by reason of the jury verdict of guilty in the trial of this cause of the crime of possession of marijuana not for personal use, to pay a fine of $500 and to serve a sentence of two years in the Iowa Men's Reformatory at Anamosa, Iowa. Costs taxed to the defendant. Appeal bond $1,000. The defendant shall be given credit for time which he spent in the Linn County, Iowa jail after he was arrested on this charge. Defendant will be given until 12:00 o'clock noon, September 4, 1970 to report to the office of the sheriff of Linn County, Iowa to commence serving his sentence herein imposed. Defendant was advised of his right to appeal.

Dated this 28th day of August, 1970.

/s/ B. J. MAXWELL,
Judge of the Eighth Judicial District of Iowa.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Appellee,
vs.
KEVIN JOSEPH LYNCH,
Appellant.

Filed April 13, 1972.

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54443

Appeal from Linn District Court—B. J. Maxwell, Judge.

Defendant was convicted of possessing marijuana for sale. He was sentenced under section 204.20(5), The Code, 1966, and he appeals from that judgment.—AFFIRMED.

R. Fred Dumbaugh and Guy P. Booth, both of Cedar Rapids, for appellant.

Richard C. Turner, Attorney General, and Allen J. Lukehart, Assistant Attorney General, for appellee.

LEGRAND, *J.*

Defendant was convicted of violating chapter 204 of the Uniform Narcotic Drug Act, The Code, 1966 (since repealed and replaced by the Uniform Controlled Substances Act, chapter 148 and amended by chapter 149, Acts of the Sixty-fourth G.A., First Session). He appeals from the judgment sentencing him to serve a term of two years in the men's reformatory and to pay a fine of $500.00. We affirm the trial court.

We refer to the facts as they become important in our consideration of the various issues relied upon for reversal. These issues are: (1) the conviction must be set aside because defendant had not entered a plea to the charge of which he was accused; (2) there was prejudicial error in defining the crime of which defendant was convicted;

(3) there was prejudicial error in the admission of testimony offered by a state narcotics agent; (4) section 204.18, The Code, 1966, is unconstitutional because it imposed upon defendant the burden of proving one of the elements of the charge against him; and (5) no probable cause existed for the issuance of the search warrant under which certain contraband drugs were seized and this evidence should have been suppressed.

I. We consider first defendant's claim of prejudice because he was tried without first having entered a plea to the charge against him. As pointed out in State v. Dorr, 184 N.W. 2d 673 (Iowa 1971), our law recognizes only three pleas in criminal cases—guilty, not guilty, or former judgment of conviction or acquittal of the defendant. Section 777.11, The Code.

We assume defendant did not desire to enter a guilty plea; nor does he contend the plea of former conviction or acquittal was available to him. This then leaves open to him only a plea of not guilty.

Defendant was not prejudiced by the inadvertent omission of recording a formal not guilty plea. *He stood trial without objection* and his position was precisely the same as if such a plea had been entered. The jury, in fact, was told that the defendant had entered a not guilty plea.

The contention urged by defendant here has been unsuccessfully made on a number of prior occasions. What we said in State v. Girdler, 251 Iowa 868, 870, 102 N.W. 2d 877, 878 (1960) is decisive here. There is no reversible error in this assignment.

II. Defendant also asserts he should have a new trial because the crime of which he was convicted was improperly defined in the court's instructions. Conceding the procedure followed is not one to be recommended, we reach the conclusion defendant is not entitled to the relief demanded.

Defendant was convicted of the illegal possession of marijuana. Section 204.20(5), The Code, 1966, prescribes the punishment for this offense depending upon the circumstances of the possession. This section provides in pertinent part as follows:

> "Any person violating this chapter by possessing, purchasing, or attempting to purchase marijuana in such quantity that it can logically be inferred that such marijuana is intended for personal use only and is not held for sale to others, and such marijuana is not part of any narcotic drug, shall be guilty of possession of marijuana for personal use and shall * * * be imprisoned in the county jail not to exceed six months or be fined not to exceed one thousand dollars, or both. * * * Any person violating this chapter by possession, purchasing, or attempting to purchase marijuana in such quantity that it can logically be inferred that such marijuana is intended for sale shall be guilty of possession of marijuana held for sale and shall be punished as provided in subsection 1 of this section [which provides for imprisonment of not less than two or more than five years and for a fine of not more than $2000.] Possession of marijuana for personal use shall be a lesser included offense of possession of marijuana held for sale. * * *"

Defendant argues the instructions submitted an improper definition of the crime and permitted his conviction for conduct which the statute does not prohibit. To put this issue in proper perspective we set out in detail the instructions dealing with this assignment.

In its statement of the issues the trial court said defendant was accused of possessing marijuana "in such quantity that it can be logically inferred that such marijuana was not intended for personal use only." No mention was there made about selling the drug to others.

Instruction 6 contained the following:

"The information herein charges possession of narcotic drugs and included in this charge are the following offenses: Possession of marijuana for sale. Possession of marijuana for personal use."

The elements which the State was required to prove beyond a reasonable doubt to secure a conviction were set out in Instruction 8 as follows:

"In order to convict the defendant in this case the State must establish beyond a reasonable doubt each of the following propositions, to wit:

"1. That the substance marked State's Exhibit 5 in this record is marijuana.

"2. That the defendant did on or about December 22, 1968 in Linn County, Iowa, have said exhibit in his possession or under his control as defined in these instructions.

"3. At said time and place defendant knew of the presence of said exhibit and knew that it was marijuana.

"If you find the State has proven all of the foregoing propositions beyond a reasonable doubt, then you must further determine whether said possession by the defendant was or was not for purposes of personal use only, as hereinafter defined.

"If you find the State has failed to prove any of the foregoing propositions beyond a reasonable doubt then it is your duty to find the defendant not guilty, and return your verdict on Verdict Form No. 3.

"If you find that the State has established beyond a reasonable doubt that the amount of marijuana in said State's Exhibit in this record is in such quantity that it can be logically inferred that such marijuana was not intended for personal use only but was held for sale to others then it is your duty to find the defendant guilty of possession of marijuana not for

personal use and return your verdict on Verdict Form No. 1.

"If you find that the amount of marijuana in said State's Exhibit in this record is in such quantity that it can be logically inferred that such marijuana was intended for personal use only and not for sale, then it is your duty to find the defendant guilty of possession of marijuana for personal use and return your verdict on Verdict Form No. 2."

The jury found defendant guilty of the greater offense and returned its verdit on Form No. 1 which is here set out in full:

"VERDICT FORM No. 1

"We, the jury find the defendant, Kevin Joseph Lynch, guilty of possession of marijuana not for personal use.

/s/ KENNETH L. GOODWIN, *Foreman*
10-22-69."

Defendant's argument may be paraphrased in this manner. He says that under the instructions and the forms of jury verdict submitted he was convicted of a crime for which there is no statutory basis. Sections 204.2 and 204.20(5) define the criminal possession of marijuana in two ways—possession for personal use or possession for sale. He insists that the instructions here permitted his conviction if the jury found simply that the marijuana was not for his personal use, even though it may not have been held for sale to others. This, he says, eliminated the essential element of the greater crime, which is the intent to sell to others, not simply that one has more of the substance than he himself may use.

There is considerable merit in this argument and if the instructions were fairly open to the criticism that the jury could have been confused or uncertain about the elements of the crime, defendant would be entitled to a new trial.

In considering this objection of course the instructions must be read together and not considered piecemeal. State v. Morelock, 164 N.W. 2d 819, 822 (Iowa 1969) and citations. In both Instruction 6 and Instruction 8 possession for sale was specifically made an element of the matters submitted to the jury. Instruction 8, which is the instruction submitting the elements to be proven, clearly and unequivocally required the jury to find possession was for sale to others before a conviction could be returned on the more serious charge. When explaining the necessity for such a finding, the court specifically referred to Verdict Form No. 1 as the form upon which such a finding should be recorded. While it is true this form of verdict did not include a reference to possession for sale to others, and while we agree it would have been better had it done so, there can be no doubt about the clear meaning and intent of the instructions when Instruction 6 and Instruction 8 are related to the form of verdict returned by the jury.

We do not approve the form of jury verdict used under these circumstances, nor do we feel that the statement of issues was as clear to the jury as it might have been, but we should not reverse for such errors unless there is reasonable basis for finding that the jury was confused or that the instructions, when viewed as a whole, were so contradictory that the jury may have followed a wrong one instead of a proper one.

We have carefully reviewed all the instructions and we can find no reversible error in the instructions as submitted. We therefore hold against defendants on this assignment of error.

III. Defendant next complains there was error in the admission of the testimony of the state narcotics agent. The principal objection raised was that the evidence was beyond the scope of the minutes of testimony attached to the information. Later an additional objection was added

to part of the testimony on the ground that it was not relevant or material.

Assuming the latter objection was sufficiently specific to raise the issue, we believe the trial court was correct in receiving it as relevant on the issue of defendant's intent to sell the marijuana in his possession. The testimony objected to was based on the agent's experience in narcotics investigations and described in some detail the manner in which marijuana is measured out and packaged for resale purposes. From this description the jury could properly find the marijuana in defendant's possession was intended for sale.

On the original objection that the testimony went beyond the minutes attached to the information, we believe our prior decisions on this subject justified its admission. See State v. Miller, 259 Iowa 188, 196, 142 N.W. 2d 394, 399 (1966) and citations.

IV. One of the defendant's principal assertions is that section 204.18, The Code, 1966, is unconstitutional because it required him to prove he did not come within one of the exceptions of the statute under which possession of narcotic drugs was not illegal.

Section 204.2 prohibits all possession of narcotic drugs "except as authorized in this chapter." Various sections of chapter 204 provide circumstances under which possession of narcotics is permissible. Then section 204.18 establishes the following rule on burden of proof:

> "In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this chapter, it shall not be necessary to negative any exception, excuse, proviso, or exception, contained in this chapter, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the defendant."

It is the constitutionality of this section which is attacked by defendant, who argues the State should have been compelled to establish beyond a reasonable doubt that defendant *did not* come within any of the exceptions instead of casting on him the burden to show he *did*.

We hold it was clearly the duty of defendant to prove he was excused from complying with the prohibition of the statute. If an exception is material in arriving at the definition of the crime, it is generally held the State has the burden of showing the exception does not apply because it is then one of the essential elements of the offense. However, where the exception merely furnishes an excuse for what would otherwise be criminal conduct, the duty devolves upon the defendant to bring himself within the exculpatory provision. State v. Snyder, 244 Iowa 1244, 1249, 59 N.W. 2d 223, 226 (1953); State v. DeMarce, 237 Iowa 648, 649-654, 23 N.W. 2d 441, 442-444 (1946); 1 Underhill on Criminal Evidence, Fifth Ed., sections 52, 53, pages 88-90; 22A, C.J.S., Criminal Law, section 571, page 315; Stanley v. State (Ind. 1969), 245 N.E. 2d 149, 151; State v. Kahler (Fla. 1970), 232 S. 2d 166, 168; State v. Belanger (Conn. 1961), 167 A. 2d 245, 248; State v. Rowe (Maine 1968), 238 A. 2d 217, 221; State v. Seng, 91 N.J. Sup. 50, 219 A. 2d 185, 186 (1966). See also Annotation at 153 A.L.R. 1249.

V. This brings us to defendant's last and most serious assignment of error in which he alleges the search warrant under which the contraband drugs were seized was issued without probable cause. His motion to suppress the evidence on that ground was overruled. His later objections to the introduction of the seized evidence met the same fate. He urges this as a ground for reversing his conviction.

We relate the background facts leading up to the issuance of the search warrant.

On December 20, 1968, a search warrant issued upon the order of the Honorable William R. Eads, Judge of the Linn County District Court, who found probable cause had been shown for the immediate search of a man's suitcase for "narcotic drugs, marijuana and prescription drugs." The order was based entirely upon the facts shown in a sworn information filed by Calvin Trousdale, a Cedar Rapids police officer, and George H. Mayer, a State Narcotics Agent, who stated under oath substantially as follows: That they had made a complete investigation into defendant's activities and knew all of the facts in the police file; that they were aware of defendant's suspicious actions during the previous two weeks; that they had reliable information from a reliable informant who is a credible resident of the state of Iowa that defendant has been selling narcotic drugs and marijuana, and that defendant left several days previous to the date of the application for California to pick up a load of drugs; that during a flight into Cedar Rapids defendant had offered to obtain drugs for the airline stewardess; that defendant was arrested on or about June 5, 1968, in California on a narcotics charge; that an official from United Air Lines informed affiants that defendant had offered to obtain narcotics for the stewardess on his flight on December 19, 1968.

These were all the facts before Judge Eads at the time the search warrant issued. We have reviewed the necessity for showing probable cause before a search warrant may issue in a number of recent cases. State v. Spier, 173 N.W. 2d 854 (Iowa 1970); State v. Salazar, 174 N.W. 2d 453 (Iowa 1970); State v. Jensen, 189 N.W. 2d 919 (Iowa 1971) and State v. McReynolds, opinion filed March 16, 1972.

Those cases contain our latest pronouncements on the circumstances under which probable cause may be said to exist for the issuance of a search warrant, both under

Amendment 4 of the United States Constitution and under section 8, Article I of our own. It is unnecessary to repeat here what was said there.

The standards established may be summarized as follows:

1. Search warrants may issue only on a showing of probable cause under oath or affirmation.

2. In passing on the validity of a search warrant, a reviewing court may consider only information brought to the attention of the issuing officer.

3. The issuing officer must make his own independent determination of probable cause on the basis of facts related to him and may not rely on mere conclusions recited by the applicant.

Despite our repeated announcements that a search warrant may be issued only upon probable cause and only when the issuing officer has sufficient facts before him to make his own determination that it exists, those applying for search warrants insist upon making only the barest factual showing and upon reciting nothing more than their own conclusions. In the case now before us, for instance, except for the recitation that defendant had offered to supply narcotics to the stewardess on the flight into Cedar Rapids, we have no hesitancy in saying that probable cause for the issuance of the warrant could not be found.

Nothing else appears except the conclusions of the police officers, who asserted they had the defendant under surveillance for several weeks and that his actions were "suspicious." This conclusion was entirely unsupported by facts. They also stated they knew everything that was in the police files; but the writ cannot issue on what *they* secretly know. It can issue only on information communicated to the issuing officer who then makes his own determination of probable cause. We meet this same

situation repeatedly despite the many times we have pointed out what must be shown. The most dedicated and diligent investigatory work is unavailing if the evidence thereby uncovered cannot be used to secure a conviction. The State came perilously close to such a fate here.

We sustain the issuance of the writ only because of the factual recitation concerning the conduct of the defendant on his flight to Cedar Rapids. We hold it is reasonable to conclude that one traveling on an airliner who offers narcotics to the stewardess may have such narcotics on his person or among his effects. Supported by the statements of an official of the airlines this was sufficient to furnish probable cause. On that basis, and on that basis alone, we hold the search and resulting seizure were proper.

VI. We have considered each assignment of error relied on for reversal. We hold the judgment of the trial court was correct and should be affirmed.

AFFIRMED.

All Justices concur, except Rawlings, *J.*, who dissents.

APPENDIX C.

EXHIBIT "A".

IN THE DISTRICT COURT OF IOWA
In and for Linn County, Iowa

STATE OF IOWA, *Plaintiff,* *vs.* KEVIN LYNCH and a blue mans suitcase, *Defendant.*	Vol. 255 Information for Search Warrant No. 22790

STATE OF IOWA, COUNTY OF LINN. } ss.

We, George H. Mayer, Calvin Trousdale, being first duly sworn on oath states that he is a credible resident of Linn County, Iowa, that he has good reason and probable cause to believe and does believe, that certain personal property described as follows: Narcotic drug, marijuana, and prescription drugs

(a) has been illegally kept; and/or

(b) has been used as a means of accomplishing a felony; and/or

(c) is being used with intent to commit a public offense; and/or

(d) held in violation of the laws of the State of Iowa the following described premises, place, residence and or automobile: to wit; Chapter 155.26 and 204.2 of the 1966 Code of Iowa. In a blue mans suitcase with claim check No. 823-451.

That the facts and circumstances which lead me to believe that there is probable cause that a crime was committed and that the above described premises, place, residence and/or automobile should be searched are as follows: that we have made the complete investigation into this matter and know all of the facts in the Police File on this matter. That we have been watching Kevin Lynch for the past two weeks and have been aware of his suspicious actions during that time period. That we have reliable information from a reliable informant who is a credible resident of the State of Iowa and he informs us that in the last 2 weeks Kevin Lynch has been selling narcotic drugs, and marijuana and during this time period he has been high on drugs himself. We are also informed from this same person that Kevin Lynch left a few days ago to go to California to pick up a load of drugs and that he was arrested 12-19-1968 for intoxication in Linn Co., Iowa because he had urinated the seat of the airplane and during that time offered to obtain drugs for the Stewardess. That to our best information this Kevin Lynch was arrested on June 5, 1968 in California on a narcotic charge. That claim No. 823-451 is a claim number for a suitcase for United Airlines and said claim check is in the personal belongings checked with Kevin Lynch's personal belongings at the Cedar Rapids Police Department when he was arrested on the intoxication charge. That we know of our own personal knowledge that the claim check is in the personal possession of Kevin Lynch, in his personal belongings in the Cedar Rapids Police Department. An official from United Airlines informed us that the defendant had urinated on the airplane seat and had offered a stewardess narcotics.

WHEREFORE, the undersigned applies to William R. Eads a Judge of the District Court of Linn County, Iowa, for a search warrant to be issued and the said suitcase be searched for said property.

GEORGE H. MAYER,
CALVIN TROUSDALE.

Subscribed and sworn to before me and in my presence by said Calvin Trousdale and George H. Mayer this 20th day of December, 1968.

(Illegible)
Notary Public, In and for
Linn County, Iowa

Instructions

1. Either District, Municipal or Justice.

2. Either Iowa, Cedar Rapids, or name of Township.

3. Identify fully, that is, address of premises, apartment number and garage, make, license number of auto, name of the defendant.

4. Your name (make sure you have first-hand knowledge of the facts).

5. Particularly describe the property you want to obtain. List it in great detail—any money and how it's wrapped or marked. Give approximate length of tools, describe color of any items. Give exact address of the premises, apartment number, or the type of building which you want to search on the property.

6. Cross out the lines which don't apply.

7. Particularly describe the premises (address), apartment number and garage, the year, make, model and license number of the automobile.

8. Set out as many facts as possible on which the application is made. Include any knowledge of an informant.

9. Name of the Judge.

10. Either District, Municipal or Justice.

11. Describe the property to be searched.

12. Have Someone Sign the Application Who Knows the Facts.

Grounds for Search Warrant (Section 751.3)

It may be issued upon any of the following grounds:

1. For property which has been stolen or embezzled.

2. For property which has been used as a means or as one of the means of committing or of accomplishing the commission of a felony.

3. For property which is in the possession of a person with the intent to use it as a means of committing a public offense, or which has been delivered by such person to another for the purpose of concealing it.

4. For property which is being used or employed in carrying on, keeping or maintaining a place of any description for the purpose of gambling for money or for any other thing of value.

5. For personal property of the character enumerated in Section 726.4.

6. For property of the character specifically enumerated in Section 726.5.

7. For cigarettes and cigarette papers, and the containers thereof received, possessed, kept, stored, sold or given away in violation of any law of this state, or with intent to violate any such law.

8. For intoxicating liquors, including alcohol, brandy, whiskey, rum, gin, beer, ale, porter, wine, spirituous, vinous, and malt liquors, manufactured, sold, kept for sale, owned or possessed in violation of any law of this state, including

all instrumentalities, containers, equipment, articles or things used or employed or intended to be used or employed in effecting said unlawful acts or any of them.

9. For any other property which is legally subject to a search warrant by any law of this state.

Information for Search Warrant

Section 751.4 Information. Any credible resident of this state may make application for the issuance of a search warrant by filing before any magistrate except a judge of the supreme court, a written information, supported by his oath or affirmation, and alleging therein the existence of any ground or grounds specified in this chapter as ground for the issuance of a search warrant and that he believes and has substantial reason to believe that said ground or grounds exist in fact. Said information shall describe with reasonable certainty the person or premises, or both, to be searched, the property to be seized, and the person, if known, in possession of said premises and property.

EXHIBIT "B".

IN THE DISTRICT COURT OF IOWA
In and for Linn County, Iowa

STATE OF IOWA, *Plaintiff*, vs. KEVIN LYNCH and a blue man's suitcase, *Defendant*.	No. 22790 Vol. 255 Search Warrant

The State of Iowa to Any Peace Officer of Linn County, Iowa

Proof having been this day made before me as provided by law that certain property is owned or possessed in violation of the laws of Iowa in said county, in the State of Iowa, in the place, building, and dependencies thereto described as follows: (Describe as set forth above). a blue man's suitcase with claim check No. 823-451 and occupied by and in possession of the person above named as defendant and being satisfied that the foregoing recital relative to said property is probably true, now, therefore, you are commanded to make immediate search of the premises and person above described and search for: Narcotic drugs, marijuana, and prescription drugs and if said property or any part thereof be found you are commanded to bring said property forthwith before me at my office.

Dated at Cedar Rapids, Iowa, this 20th day of December, 1968.

/s/ WILLIAM R. EADS,
Approximately 12:10 P.M.,
Judge of the District Court of Iowa.

Return of Service

STATE OF IOWA } ss.
LINN COUNTY }

I, Charles H. Smith, being a peace officer in and for Linn County, State of Iowa, hereby certify that the within search warrant came into my hands on the 20th day of December, A. D. 1968, and on the 22nd day of December, A. D., 1968. I executed said warrant by making a search of the premises therein described and found on the premises therein designated the following property, to-wit: (State kind and quantity): one small plastic bag containing 14 red capsules with lettering Lilly 140 and three orange capsules wrapped in foil. One white paper bag with the label Armstrongs containing eight balls of a brown pasty substance. One brown bottle labeled MDX formula 42 liver and iron tablets containing 93 green capsules. One brown bottle labeled Gem vitamins C ascorbic acid containing 4 white tablets. (cont. on attached sheet.)
which said property I seized by virtue of the within warrant and which I now hold subject to further orders of the court.

I have further executed the within warrant by giving a copy thereof, together with a receipt for the property taken to Billie Dean Carson and Kevin Joseph Lynch.

No person having been found on the within premises, I have left a copy of the within warrant and a receipt for the property taken in the place where the property taken was found.

I, the officer by whom the annexed warrants was executed, do certify that the above inventory contains a true and detailed account of the property taken by me on the warrant, and was made publicly and in the presence of the person from whom taken.

Fees $_____
Services _____
Mileage _____
Cartage _____

CHARLES H. SMITH,
Detective, Cedar Rapids, Iowa P. D.